of Congress. As to the existence of a federal common law, however, authorities are as widely at variance as ever. The adherents of its existence from Du Ponceau down are at least equally matched by its opponents [see authorities collected in 63 N. W. R. 589, *supra*]. If, then, the existence of a federal common law is not firmly enough established to afford escape from the results of the doctrines of the principal cases, escape may still be found in controverting the view that the power to control interstate commerce, which was reserved to Congress by the Constitution, excludes, even before legislation, the State common law on the subject. There is a possibility that this contention may prevail.

The exclusiveness of the power of Congress to control depends, according to the test given in *Cooley* v. *Wardens*, 12 How. 299, on whether the nature of the matters to be controlled makes necessary a uniform rule throughout the States. Accordingly States may pass bankruptcy laws in the silence of Congress on the subject; but not statutes controlling interstate commerce [*Wabash Ry.* Co. v. *Illinois*, 118 U. S. 557]. The above test, at first thought final and confidently applied, has been more recently questioned, and the tendency of the United States Supreme Court is toward a greater hesitancy to discover the necessity of a uniform rule [2 Thayer's Cases on Const. Law, 2190, note]. In fact, though the last decided cases on the point are hostile to any control by the states of interstate commerce in the absence of congressional legislation, it would not be suprising to see the law circle back to the position taken by Matthews, J., in the case of *Smith* v. *Alabama*, 124 U. S. 465. He stated that the duties and liabilities of interstate carriers, before Act of Congress, are enforceable only under State common law, and "the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law." Certainly, the last word on this confused subject is far from said.

RECENT CASES.

AGENCY — INSURANCE POLICY ISSUED BY INTERESTED PARTY. — Defendant company's agent, who issued an insurance policy to the plaintiff corporation, was a stockholder and officer in that corporation. On that ground defendant company refused to pay plaintiff corporation's loss for the recovery of which this action is brought. *Held*, that the defendant company is justified in his refusal to be bound by the policy. *Greenwood Ice & Coal Co.* v. *Georgia Home Ins. Co.*, 17 So. Rep. 83 (Miss.).

This decision seems clearly right and in accord with authority. *New York Central Ins. Co.* v. *National Protection Ins. Co.*, 14 N. Y. 85. The agent for the one party appears from the statement of facts to have been in effect the agent of the other also, and this relation of parties cannot exist, owing to the antagonistic interests represented. The exception made in the case of auctioneer's clerks does not apply here, as in that case the clerk is agent for a simple ministerial purpose, and it is a custom well understood by all parties concerned. In general, an agent for one party cannot act in the same transaction for the other party, and in such a case the contract is voidable. 1 Biddle on Insurance, § 497.

BANKS AND BANKING — INSOLVENCY OF COLLECTING BANK — TRUST FUNDS. — A bank received a note for collection and remittance, but, instead of remitting, credited its correspondent with the proceeds, and three days later failed. At the time of failure the cash on hand was less than the amount collected, but the receiver realized from the assets enough to pay all preferred claims. *Held*, plaintiff has a lien on cash on hand

at time of failure, but cannot come in as preferred creditor with respect to the amount since realized from the assets by the receiver. *Boone County Nat. Bank* v. *Latimer et al.*, 67 Fed. Rep. 27.

It is now pretty well settled that where trust property has been confused with other property of the same kind the equity is not destroyed, but converted into a charge upon the entire mass, giving the *cestui que trust* a prior right over other creditors. *Peters* v. *Bain*, 133 U. S. 693. But here the assets realized on by the receiver were not, in part or in whole, the product of the converted money, and the principle just stated has never been extended to allowing a priority against funds other than those with which the trust money was mixed. The case is clearly right on both points.

BILLS AND NOTES — NEGOTIABILITY. — A promissory note contained an agreement that if there should be any depreciation, before the maturity of the note, in collateral deposited to secure its payment, the payee or holder might call for further security, and if it were not furnished within two days, might sell the collateral and apply the proceeds towards extinguishing the note. *Held*, non-negotiable. There might be a payment of an uncertain sum before maturity, thus rendering the amount payable at maturity somewhat less than the amount specified on the face of the paper. *Lincoln Nat. Bank* v. *Perry*, 66 Fed. Rep. 887.

This decision is based on the principle that a note for an uncertain amount is non-negotiable. But, it is submitted, there is no uncertainty here as to amount; a definite sum, $5000, must be paid, and the only uncertainty is as to the time of payment, the holder having an option under certain circumstances to force payment of the whole or part before maturity. This option should not be held to destroy the negotiability of the note. The time of payment must certainly come, and an option in the maker to pay, or in the holder to enforce payment, before maturity, does not affect the negotiability of notes. *Jordan* v. *Tate*, 19 Ohio St. 586.

CONSTITUTIONAL LAW — BAR OF STATUTE OF LIMITATIONS — VESTED RIGHT. — A school district issued bonds that were declared void after the statute of limitations had run against the recovery of the original consideration. The Illinois Legislature passed an act giving holders of such bonds one year in which to sue for the recovery of their money. It was objected that this was a taking of property without due process of law within the meaning of the prohibition in the State constitution. *Held*, that the right to set up the bar of the statute of limitations as a defence to a debt was a vested right, and could not be suspended by the legislature. *Board of Education* v. *Blodgett*, 40 N. E. Rep. 1025 (Ill.).

The authorities are practically unanimous that a title to property acquired by the statute is a vested right. Cooley Const. Lim. (6th ed.) 448. In regard to the right to plead the statute as a defence to a debt, the great authority of the United States Supreme Court is against it. *Campbell* v. *Holt*, 115 U.S. 620, 6 Supr. Ct. 209. So in Texas and Alabama *Bentinck* v. *Franklin*, 38 Tex. 458; *Jones* v. *Jones*. 18 Ala. 248. But in eighteen other American jurisdictions where the question has arisen a contrary result has been reached, as shown by the cases cited by the Illinois Court. It is a question scarcely to be argued according to any principle, and the present case follows the overwhelming weight of authority.

CONSTITUTIONAL LAW — VALIDITY OF A PARTLY UNCONSTITUTIONAL STATUTE. — *Held*, that where one entire scheme of taxation is provided for in certain sections of an act, so that to declare part of the tax unconstitutional, would leave in operation a tax which Congress would never have intended to stand alone, all the sections are invalid. *Pollock* v. *Farmers' Loan & Trust Co.*, 15 Sup. Ct. Rep. 912, 920.

The principle recognized in this "income tax" decision has long been well established; but the notoriety of the case due to the importance of the interests at stake, and the exceptional features that attended its course to a final decision in the Supreme Court of the United States, will probably make it a leading authority on the point. See 9 HARVARD LAW REVIEW, 198.

CONTRACTS — CERTIFICATE OF ARCHITECT. — *Held*, that, notwithstanding the stipulation in a building contract that prior to payment the architect's certificate must be obtained, the builders are entitled to the balance due on their account, although no certificate is obtained, the unsatisfied claims of sub-contractors being the only objection to granting certificate, although same had been provided for by builders to be paid out of the amount due. *Mahoney et al.* v. *Rector, etc. of St. Paul's Church*, 17 So. Rep. 484 (La.).

Such a stipulation as we find in a contract of this kind is an express condition, which the English courts enforce with logical rigor. The present case illustrates the general American rule, which is based on equitable grounds and followed in the different States, with varying degrees of leniency. The court here pronounces the objection

of the architect purely technical, unreasonable, and possibly the result of undue influence on the part of the defendant, although it does not deem the fact of collusion essential to its decision.

CONTRACTS — CONSIDERATION — SUCCESSIVE PROMISES OF SAME PERFORMANCE. *Held*, (1) the promise of a party to a contract to do, or the doing of, that which he is already bound to do, is not a good consideration for the promise of the other party to pay an additional sum; (2) a rescission of the former contract will not be inferred except where the party to whom the promise of an additional sum is made, has refused to perform because of difficulties in the way of performance not anticipated by the parties when the original contract was made; the difficulties encountered need not be such as to furnish a legal defence for non-performance. *King* v. *Ry. Co.*, 63 N. W. Rep. 1105 (Minn.).

The holding on the first point is thoroughly sound. *Bryant* v. *Lord*, 19 Minn. 396 at 404 *contra*. On the second point American courts have generally inferred a rescission of the original contract, from defendant's act in entering into the second agreement. The Minnesota Court refuses to make this inference of a rescission from the mere existence of the second agreement, except in a very narrow class of cases. Not even in this narrow class of cases, as it seems to us, does the defendant's part in making the second agreement indicate that he at any time intended to forego his right to require performance under the original contract. See 8 HARVARD LAW REVIEW, 27.

CONTRACTS — PARTNERSHIP — NOVATION. — A., B. and C. were partners and indebted to plaintiff. A. and B. bought out C., and as part of consideration agreed to assume debt to plaintiff. Plaintiff sued A. and B. for this debt, alleging in his declaration a request for the money and a refusal. Defendants demurred on ground of no privity of contract. *Held*, that while novation could only exist by consent of all the parties interested, yet plaintiff's assent was sufficiently shown by the alleged demand on the new firm and the institution of suit, which would operate as an estoppel of any claim against the old firm. *Tyson* v. *Somerville*, 17 So. Rep. 567 (Fla.).

While the question of whether there was a novation or not is properly for the jury, *Harris v. Farwell*, 15 Beav. 31; *Backus* v. *Fobes*, 20 N. Y. 204; yet when a new firm assumes the debts of its predecessor, slight circumstances will support the inference of the creditor's assent. *Shaw* v. *McGregory*, 105 Mass. 96; *Ex parte Williams*, Buck. 13. A demand on the new firm, followed by suit therefor, seems abundant evidence of assent, and the above decision quite right.

CONTRACTS — VALIDITY — CONSIDERATION. — The plaintiff was under an engagement to marry her present husband, when the defendant offered to pay her an annuity, provided the marriage took place within three months. *Held*, on the authority of *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159, that with the satisfaction of the terms of the offer, a valid contract arose. *Skeete* v. *Silberberg*, 11 *The Times* Law Rep. 491 (Q. B. Div., Wills, J.).

Although already bound by her engagement to perform a portion of the defendant's proviso, the plaintiff was under no obligation to marry before a reasonable time had elapsed, so that a marriage within three months leaves no difficulty regarding a detriment to the plaintiff in this case. Whether that detriment was suffered at the request of the defendant, whether compliance with his proviso is the thing in exchange for which his promise was given, or merely a condition to his gift, is the real point at issue. The truth should be gathered from all the circumstances, benefit to the promisor being well nigh determinative. The English Court, however, passes lightly over such debatable ground, merely recognizing as stronger than this the case of *Shadwell* v. *Shadwell*.

CRIMINAL LAW — HOMICIDE IN SELF-DEFENCE — DUTY TO RETREAT. — *Held*, that in case of felonious assault where assailant is killed, it is error to charge that if prisoner could have retreated safely, he should have done so. *Beard* v. *United States*, 15 U. S. Sup. Ct. Rep. 962. See NOTES.

CRIMINAL LAW — LARCENY — CONSENT. — One Leech gave the prisoner a £ 10 note, both supposing it at the time to be a £1 note. A substantial period of time after this, the prisoner discovered the mistake and appropriated the whole of the note. *Held*, by five judges to four, that the prisoner was not guilty of larceny, as the taking was with the consent of Leach. *Reg.* v. *Hehir*, 29 Ir. L. T. 323. See NOTES.

CRIMINAL PROCEDURE — EFFECT OF ERRONEOUS SENTENCE. — Defendant was tried and convicted of a criminal offence, for which the District Court imposed a sentence different from that authorized by law. Defendant brought writ of error to the United States Circuit Court, where the judgment was reversed and the cause remanded. On objection to District Court's further jurisdiction in the matter, it was *held* that the

Court had power to resentence the prisoner notwithstanding that part of the void sentence had been executed. *United States* v. *Harmon*, 68 Fed. Rep. 472.

The effect at common law of the reversal of an erroneous sentence is a question upon which authorities have divided very evenly. The earlier and more orthodox view was that it discharged the prisoner completely. *Bourne* v. *Rex*, 7 A. & E. 58, 2, Nev. & P. 248; *Sumner* v. *Commonwealth*, 3 Cush. (57 Mass.) 521; *McDonald* v. *State*, 49 Md. 90; *Elliott* v. *People*, 13 Mich. 365; *Howell* v. *State*, 1 Or. 241; *State* v. *Child*, 42 Kan. 611; *People* v. *Taylor*, 3 Den. (N. Y.) 91. In England, Massachusetts, and New York this has now been changed by statute to correspond with the view of the principal case, which is also the common law ruling of *Kelly* v. *State*, 11 Miss. 518; *Terr* v. *Conrad*, 1 Dak. 363; *Beale* v. *Comm.* 25 Pa. 11; *People* v. *Riley*, 48 Cal. 549; *State* v. *Shaw*, 23 Iowa, 316; *Brown* v. *State*, 13 Ark. 96; *State* v. *Nicholson*, 14 La. 785. See also *Re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, controlling the principal case. The present tendency toward disregarding legal technicalities is likely to make cour s prefer the latter op nion where the point is yet open.

DAMAGES — EXEMPLARY ALLOWED IN CIVIL ACTIONS. — Defendant is sued in tort under a statute allowing suit by a wife for the wrongful sale of liquor to her husband. *Held*, exemplary damages should be awarded. *Mayer* v. *Frobe*, 22 S. E. Rep. 58 (W. Va.).

This decision overrules the cases of *Pegram* v. *Stortz*, 31 W. Va. 220, and *Beck* v. *Thompson*, 31 W. Va. 459, in so far as they hold that exemplary damages in a proper case, cannot be inflicted by way of punishment in a civil suit upon a wrongdoer, and places West Virginia among the list of States which allow exemplary damages.

DAMAGES — UNLAWFUL EXPULSION OF PASSENGER. — Plaintiff was evicted from a car because he would not pay his fare instead of his ticket, which the conductor thought bad. Plaintiff resisted. The ticket proved good, and plaintiff now sues the company and claims to recover damages for a nervous disorder brought on because of the force used by the conductor in overcoming plaintiff's resistance. *Held*, that plaintiff can recover damages for the injury, though caused by his resistance, because he rightly resisted. *Pittsburgh C., C. & St. L. Ry. Co.* v. *Russ*, 67 Fed. Rep. 662.

This decision rendered by the Circuit Court for the District of Indiana is manifestly fair, provided the plaintiff does not resist a wrong ul expulsion for the express purpose of increasing the amount of damages. The conductor committed a trespass in putting him off the train. If the plaintiff resists too much, then t e conductor may have an action for assault against him, but plaintiff's action will still remain, and the conductor be responsible for all natural consequences. In the case at bar no such unreasonable resistance was made, and the injury to the plaintiff was, as resistance was rightful, the natural consequence of the conductor's act. 2 Sedgwick on Damages, 865.

EQUITY — PARTNERSHIP — RIGHTS OF CREDITORS. — X, one of the partnership creditors, held a mortgage security for the payment of his claim, executed by one member of the firm and his wife on the property of the latter, who was in no way connected with or responsible for the partnership debts other than by the execution of this mortgage. *Held*, that X could not be compelled to first resort to his mortgage security and thus leave the partnership assets to the other creditors. *State Bank of Florida* v. *Roche et al.*, 17 S. E. Rep. 652 (Fla.).

It is a well established rule in Equity that where one creditor holds security on two funds, with liberty to resort to either, and another creditor has a junior security on only one of the funds, the former will be compelled to exhaust the fund which he alone can reach before resorting to the other fund. *Cheesborough* v. *Millard*, 1 Johns Ch. 409. In the principal case the court limits the rule and refuses to apply it where the effect would be to prejudice the rights of a third party. This limitation is an equitable one and supported by authority. *McClaskey* v. *O'Brien*, 16 W. Va. 791; *McArthur* v. *Martin*, 23 Minn. 74; *Aldrich* v. *Cooper*, 2 W. and T. Leading Cases in Equity, 82.

EVIDENCE — DECLARATIONS OF INTENTION — RES GESTA. — In an action for breach of contract of marriage, the plaintiff's intention, as showing consent on her part to the contract, was material. She offered evidence of a statement by her, that she was going to be married in October. *Held*, that it was not admissible because not part of the *res gestæ*. *Wilson* v. *Smelser*, 41 N. F. Rep. 76 (Ind.). See NOTES.

EVIDENCE — PHYSICIAN'S TESTIMONY. — Defendant-in-error told his physician that at the time of his injury he was leaning over the edge of a car-top. *Held*, that physician might give the statement in evidence, for it was not a communication made by a patient with reference to any physical disease nor know edge obtained by a personal examination of the patient, and as such privileged by the Kansas Code. *Kansas City, etc., R. R. Co.* v. *Murray*, 40 Pac. Rep. 646 (Kan.).

Communications are variously protected by statutes in the different States; but in any case, the courts are not disposed to protect communications unsuited to aid the physician in treating the patient. In the case of *Cooley* v. *Foltz*, 85 Mich. 47, a physician was allowed to testify that the plaintiff, on employing him, told him that she should need him as a witness. In N. Y., too, where the tendency of the courts has been to construe the privilege broadly as covering all communications to physicians made in the course of professional treatment, the case of *Hoyt* v. *Hoyt*, 112 N. Y. 493, 515, per Gray, J., points towards the more general doctrine. In that case, the testator's opinion of plaintiff's sanity communicated to his attending physician, was admitted in evidence.

EVIDENCE — PHYSICIAN'S TESTIMONY. — A physician who had treated the defendant, testified that the defendant told him that a piece of a nail had come out of his knee. No question of privilege of communications to a physician was involved. *Held*, that the evidence was hearsay and inadmissible. *B. & A. R. Co.* v. *O'Reilly*, 15 Sup. Ct. Rep. 830.

The decision is undoubtedly correct; but the case is to be sharply distinguished from those cases in which it is sought to introduce a patient's statements to his physician, not as evidence of the facts stated, but as evidence of the grounds on which the physician bases his opinion of the patient's condition. There is authority for admitting such statements for the latter purpose. *Barber* v. *Merriam*, 11 Allen, 322.

EVIDENCE — PRESUMPTION OF FAULT. — *Held*, that where one vessel is clearly shown guilty of a fault adequate to account for a collision, there is a presumption raised that the other vessel is free from contributing fault until rebutted by clear proof to the contrary. *The Oregon*, 15 Sup. Ct. Rep. 804.

The presumption laid down here is not new; it is stated in substantially the same way in 1 Parsons on Shipping and Admiralty, 529, in 5 How. 441, 465, and in Olcott Adm. 132, 138. The striking feature about the presumption — one not expressly noticed in the earlier cases — is the amount of evidence necessary to overcome it. It is not enough for the vessel whose fault is sufficient to account for the collision "to raise a doubt with regard to the management of the other vessel . . . and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." *The City of New York*, 147 U. S. 72, 85. The weight of the presumption entitles it to rank with the familiar presumptions of innocence and legitimacy.

EVIDENCE — SHOP-BOOKS — ORIGINAL ENTRIES. — Where a shop-keeper enters sales of goods on loose slips of paper, which items are transferred in the evening to a ledger, if these items consist merely of a general charge of merchandise and the amount for which it sold, *held*, such a ledger is inadmissible as a book of original entries. *Way et al.* v. *Cross et al*, 63 N. W. Rep. 691 (Iowa).

The Court appears to lay down a narrower rule than is held in many jurisdictions. It would not generally be held fatal to the admission of a shop-book that the entries did not specify the kind of goods purchased. A shop-book has been held admissible in Massachusetts, although the item for which it was put in contained neither measure, weight, nor quantity. *Pratt* v. *White*, 132 Mass. 477. Books which contain nothing more than marks or figures have been held admissible if other evidence is forthcoming which can explain these and show their connection with the main transaction. *Miller* v. *Shay*, 145 Mass. 162. The fact that the book offered in evidence is kept in ledger form, and that the entries have been posted each evening from memoranda made elsewhere during the day, has been also held not to bar its admissibility. *Faxon* v. *Hollis*, 13 Mass. 42.

INTERSTATE COMMERCE — STATE CONTROL. — Where a carrier has received excessive rates for carriage of goods from one State to another under a contract made before the enactment of the Interstate Commerce Law, *held*, that he cannot be compelled to refund the excess over a reasonable charge. *Catton* v. *C., K. I. & P. R. Co.*, 63 N. W. Rep. 589 (Iowa). See NOTES.

PERSONS — DIVORCE — CRUELTY. — Petition by the husband for divorce, on the ground of extreme cruelty, the wife having repeatedly accused him both in public and private of having committed sodomy. *Held*, that to constitute legal cruelty there must be a reasonable apprehension of danger, present or proximate, to life, limb, or health (Rigby, L. J., dissenting). *Russell* v. *Russell*, 11 *The Times* Law Rep. 579. (Court of Appeal).

The above doctrine of legal cruelty was approved in *Evans* v. *Evans*, 1 Hag. Con. 38 (1790), and has been closely followed ever since by the English Courts, the Courts having "always been jealous of the inconvenience of departing from it." Justice

Rigby's dissenting opinion is a strong argument for a relaxation of the doctrine, on the ground that a series of verbal indignities are capable of amounting to legal cruelty, independently of violence. In United States many of the courts have broken away from the physical injury test, and have granted relief in cases where there was no actual violence, by a more liberal interpretation of legal "cruelty." *Rosenfeld* v. *Rosenfeld*, 40 Pac. Rep. 49 (Col.) (Mere words); *Barnes* v. *Barnes*, 95 Cal. 171 (Facts almost identical with principal case); *Straus* v. *Straus*, 67 Hun, 491; *Palmer* v. *Palmer*, 45 Mich. 150; *Scoland* v. *Scoland*, 4 Wash. 118. See also *Robinson* v. *Robinson*, 66 N. H. 600, for a very able review of the subject by Judge Carpenter.

PERSONS — MARRIAGE OF SLAVES — EFFECT OF EMANCIPATION. — Plaintiff and one Henrietta Coleman, while slaves, began living together as husband and wife, a valid marriage being prohibited to them. After emancipation, they continued to cohabit until the death of the wife in 1894, but no legal marriage ceremony was ever performed. Before Henrietta's death she conveyed to defendant certain property, in executing the deeds of which plaintiff had not joined. He sued to recover this property. *Held*, plaintiff and his wife by continuing to cohabit after emancipation ratified the marriage relation, of which they were before legally incapable, and thus established a valid marriage between themselves. The wife was then incapable of conveying real estate alone. *Coleman* v. *Vollmer*, 31 S. W. Rep. 413 (Tex.).

This decision is in strict accordance with the opinion of Mr. Bishop (1 Bishop, Mar., Div., and Sep., §§ 660-669), who thinks that a slave marriage, being deemed good by custom so far as it did not conflict with the master's rights, could be affirmed or disaffirmed by the parties without further formality when emancipated. North Carolina is the only State in which a different view has been upheld. *Howard* v. *Howard*, 6 Jones, 235.

PROPERTY — ACCRETIONS — DEMURRER UPON EVIDENCE. — Plaintiff's land was a government patent bordering on the Missouri River. The river gradually changed its course until the main channel flowed over what had once been the plaintiff's land. An island then formed within the original limits of the patent. *Held*, on demurrer upon evidence that plaintiff had no title to the island. (Brace, C. J., dissenting.) *Cox* v. *Arnold*, 31 S. W. Rep. 592 (Mo.).

This seemingly harsh case finds its explanation in the rule that in the large western rivers the fee in the bed belongs to the State, and that adjacent land granted by the United States is bounded by the bank of the river. As all gradual accretions to the bank would accrue to the benefit of the riparian owner, he must take the opposite risk and yield to the State the fee of land gradually submerged. An island formed over this new bed would come within the general rule as to islands in navigable western streams, and would go to the State. Gould on Waters, §§ 42, 76.

PROPERTY — BOUNDARIES — COURSES AND DISTANCES. — The decision in an action of ejectment depended on the construction of a deed granting 10,240 acres, describing the boundaries as follows: "Beginning at a birch-tree and running south 360 chains to a stake supposed to be in D's line, and thence . . . " If the line was run south 360 chains, it would still be one mile and a quarter from D's line, where the stake was supposed to be. *Held*, the line should not be extended, but stop at a distance of 360 chains from the birch-tree. *Brown* v. *House*, 21 S. E. Rep. 938 (N. C.).

The decision seems sound. The court admits that natural objects or monuments govern courses and distances as a general rule, but say that the reason of the rule fails to apply here as the monument, "a stake supposed to be in D's line," is too indefinite, and would call for too great an extension of the line from the birch-tree. They also give weight to the fact that the area will be much nearer 10,240 acres if the course and distance govern. This is an argument for allowing course and distance to prevail, especially where the boundaries are as doubtful as in the case at bar. 3 Gray's Cases on Prop., 285, *et seq.*

PROPERTY — EMINENT DOMAIN — PUBLIC USE. — Plaintiff railway company sought to condemn, for its proposed road-bed, an unused portion of defendant railroad company's right of way. The proposed railroad, when built, would be used mainly by a few mine-owners, and but little by the public in general. From a judgment below, in favor of plaintiff, defendant appeals. *Held*, under the Constitution, Art. 15, § 5, the proposed road would be a public carrier, and the public would, therefore, have a right to use its facilities; the character of a road, whether public or private, is to be determined by the extent of the right to use it, and not by the extent to which that right will be exercised. *B., A. & P. Ry. Co.* v. *Montana Union Ry. Co.*, 41 Pac. Rep. 232 (Montana).

The point here decided is well established. Randolph on Eminent Domain, § 56; Lewis on Eminent Domain, § 171. The opinion contains a rather interesting discus-

sion — unnecessary for the decision of the case at bar — as to the interpretation of the term public use in connection with the law of Eminent Domain.

PROPERTY — INNKEEPER'S LIEN — GOODS OF THIRD PARTY. — *Held*, that an innkeeper has a lien on all the baggage of a guest which he is bound to take in, even where he has notice that it is not the property of the guest. *Robins & Co.* v. *Gray*, 11 *The Times*, Law Rep. 569. See NOTES.

SALES — RETENTION OF POSSESSION BY VENDOR. — Plaintiff, an indorser on a note made by a shoe company, bought from the company a lot of goods in return for a promise to assume the note. The company was allowed to keep possession of the goods; later it became insolvent. Plaintiff recovered in detinue against the assignee. The lower court sat without a jury, and the upper court affirmed the judgment. *King* v. *Levy*, 22 S. E. Rep. 492 (Va.).

Here is another refreshing stand against the doctrine that retention of possession by the vendor is fraud in law. The doctrine, however, has a hold in over one-third of the American jurisdictions. See Bennett's note in Benjamin on Sales, 6th ed., 458.

TORTS — DEATH BY WRONGFUL ACT — SURVIVAL OF ACTIONS. — *Held*, an administrator cannot maintain two actions for negligence resulting in death, — one as trustee for next of kin of deceased under Lord Campbell's Act, and another for damage to the person of deceased under a statute for the survival of actions. *Lubrano* v. *Atlantic Mills*, 32 Atl. Rep. 205 (R. I.).

In general a person may sue in different capacities to obtain redress for the same wrongful act. Freeman on Judgments, § 235 *a*, Black on Judgments, §§ 536, 745. The construction of the act for survival, that it is intended to embrace only damages to the person other than those which result in death, and that it was not intended to give a remedy additional to Lord Campbell's Act, has been the construction commonly given to similar statutes in other States. See cases cited in the opinion. In Massachusetts, however, both actions may be maintained. *Bowes* v. *City of Boston*, 155 Mass. 344.

TORTS — DECEIT — HONEST INTENTIONS. — Defendant wrote a letter which would be reasonably understood to warrant a certain title unencumbered. Plaintiff sustained loss by relying upon this interpretation of the letter. *Held*, that defendant might prove in defence that its letter was intended to convey a different meaning. *Nash* v. *Minnesota Title Insurance and Trust Co.*, 40 N. E. Rep. 1039 (Mass.). See NOTES.

TORTS — LEGAL DUTIES. — *Held*, that in an action against a railroad company for an injury received through negligence an action of tort lies, whether a contract exist or not, or whether it be negligence of commission or omission. *Kelly* v. *Railway*, [1895] 1 Q. B. 944. See NOTES.

TORTS — NEGLIGENCE — DUTY TO THIRD PARTIES. — Defendant placed an elevator on trial in the building where plaintiff was an employee. Before it was accepted by his employer, and while still under supervision of the defendant, owing to its defective and improper construction, the elevator fell, severely injuring the plaintiff, who was near by *Held*, that, there being no contractual relation between the parties, nor any invitation by defendant to plaintiff, there was no liability on his part. *Zeeman* v. *Kieckheffer Elevator Mnfg. Co.*, 63 N. W. Rep. 1021 (Wis.).

While the court in this case seems clearly right in denying liability on the grounds of contract or invitation, it seems as clearly wrong in denying liability on other grounds. The defendant in building the elevator owed it as a duty to all persons rightfully in the building that it should be properly and safely erected. This it confessedly was not, to the damage of the plaintiff, for which damage the defendant's breach should render him liable. Recourse need not be had to the extreme doctrine of *Blood Balm Co.* v. *Cooper*, 83 Ga. 457, to support this decision which seems to follow from the general doctrine of liability for negligent injury.

TRUSTS — BEQUEST — CHARITABLE TRUST. — *Held*, that a bequest of a fund to a yacht-racing association to apply the income to purchase annually a cup "to be presented to the most successful yacht," etc., is void. It is not a charitable trust. *In re Nottage, Jones* v. *Palmer*, 11 *The Times* Law Rep. 519 (Court of Appeal).

The case presents an interesting and novel question. The object of the testator was "to encourage the sport of yacht-racing;" and the court based their decision on the ground that if there was any benefit to the community at large, it was too remote to warrant their establishing the gift as a charitable trust.

TRUSTS — CHARITIES. — *Held*, societies for the suppression of vivisection of animals are charities within the technical sense in which the term charity is used in law. 11 *The Times* Law Rep. 540. (Chan. Div., Chitty, J.)

If these societies had for their object merely the protection of the lower animals, though they might be benevolent, they could hardly be called philanthropic, or charitable. But the court considered that the advancement of morals among men was also involved in their object, and that they were therefore brought within the term charity. So, a Society for the Prevention of Cruelty to Animals, a Home for Lost Dogs, a Society for Protection of Animals liable to Vivisection, (35 Ch. D. 472), and an institution for studying and curing diseases of beasts and birds useful to man, (1 De G. & Jo. 72), have been held charitable.

TRUSTS — FRAUDULENT SALE — FOLLOWING PROCEEDS. — Plaintiff was induced by the fraud of B to sell him sugar on credit. B resold on credit and later made an assignment for the benefit of creditors. Plaintiff then, on discovering the fraud, sued B's assignee for the proceeds of the resales. The particular proceeds could be identified. *Held*, plaintiff has an equitable lien on the proceeds. *American Sugar-Refining Co.* v. *Fancher*, 40 N. E. Rep. 206 (N. Y.).

The case is interesting as involving a constructive trust of the proceeds of personal property, where the trustee was neither a fiduciary nor a wrongdoer who lacked title *ab initio*. The trust was, however, properly implied because of the fraud, and equity "makes use of the machinery of a trust for the purpose of affording redress in cases of fraud." Bispham on Equity, § 91. Given the trust, the proceeds, if identified, can be followed. *Newton* v. *Porter*, 69 N. Y. 133.

REVIEWS.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By Seymour D. Thompson, LL. D. San Francisco : Bancroft-Whitney Co. 1895. 8vo. 6 vol.

It is unsatisfactory to make comment upon a work of such importance and magnitude as Thompson on Corporations, before the work is given to the public in its completeness; for any judgment passed on the scope and thoroughness of the treatment of the Law of Corporations, when two of the six volumes have yet to appear, must necessarily lack finality. Therefore it has been deemed best to postpone consideration of this publication until it can be reviewed as a whole. The last volume is announced for publication in November.

MUNICIPAL HOME RULE. A Study in Administration. By Frank J. Goodnow, A. M., LL. B., Professor of Administrative Law in Columbia College. New York and London: Macmillan & Co. 1895. 8vo. pp. xxiv, 283.

The only objectionable thing about this book is its title, which gives no adequate idea of the nature or value of the contents. The author has given the reader not only a thoughtful treatise on the proper sphere of municipal action, but also an admirable summary of the present state of the law. There is no other book which contains so valuable a statement, in so small a space, of the law on certain elementary points relative to municipal corporations. Chapters VI. to XI. (both inclusive) fully justify the hope modestly expressed in the Preface, that the book may be useful from the legal as well as from the political point of view. These chapters discuss the liability of municipal corporations for torts, and the degree of protection afforded to municipal property by the constitutional provisions respecting private property. This part of the book forms an admirable introduction to what Professor Goodnow aptly terms the "great work" of